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No. 1293

In the Supreme Court of the United States

OCTOBER TERM, 1967

FRED CHERRY, ET AL., PETITIONERS

v.

THE POSTMASTER GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioner Cherry attempted to transmit through the mails a number of postal cards, including several addressed to petitioner Tortorice.[1] The postal cards state, *inter alia,* that the Reverend Robert W. Wood, pastor of the Zion United Church of Christ, Newark, New Jersey, is "one of the foremost leaders of the organized homosexual movement of America"; that Reverend Wood has written a book in which he "insinuates that Jesus Christ was a homosexual"; and that the "ultimate aim of the organized homosexual

[1] A representative sample of the postal cards is set out in the appendix to the petition, Pet. App. 35a–36a.

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movement of America is to bring about a PERVERT WORLD". The postal cards also state that "the mailing of these postcards may be deemed an act of civil disobedience, since they violate 18 U.S.C. 1718."

Following a hearing[2] the Post Office Department determined that the postal cards were nonmailable under 18 U.S.C. 1718 and 39 U.S.C. 4001 because "the terms of the aforesaid cards are obviously intended to reflect injuriously upon the character or conduct of another," *viz.*, the Reverend Wood (Pet. App. 18a, 32a–33a). The Department's order provided that the postal cards should be held by local Postmasters until a certain date and then destroyed (Pet. App. 30a–31a).

Petitioner Cherry thereupon commenced this action in the United States District Court for the District of Puerto Rico, requesting that a three-judge district court be convened under 28 U.S.C. 2282 and 2284, and seeking a declaration that 18 U.S.C. 1718 and 39 U.S.C. 4001 are unconstitutional on their face and as applied, and an injunction enjoining the Postmaster General and the local Postmasters from enforcing those statutes against him (Pet. App. 26a–29a). Petitioner Tortorice subsequently was permitted to intervene as an additional plaintiff. The district court granted the government's motion to dismiss for failure to state a claim upon which relief can be granted, and held that in view of the insubstantiality of petitioners' constitutional claims, the convening of a

[2] The Rules of Practice in Proceedings Relative to Mailability are contained in 39 C.F.R. Part 953. See also 39 C.F.R. 124.9.

three-judge district court was unnecessary (Pet. App. 53a–60a).[3] The court of appeals unanimously affirmed without opinion (Pet. App. 66a).

1. In view of the insubstantiality of petitioners' constitutional claims,[4] the district court properly dismissed the action without convening a three-judge district court. There is no conflict of decisions,[5] and there is no occasion for further review by this Court.

Under 18 U.S.C. 1718, postal cards, envelopes, or other exposed matter which contain language "of libelous, scurrilous, defamatory, or threatening character, or calculated * * * to reflect injuriously upon the character or conduct of another * * *" are nonmailable.[6] Petitioners conceded below that the postal cards are obviously intended to injure the reputation of the Reverend Wood (Pet. 8; Pet. App. 32a, 36a). Petitioners also conceded that a "statute barring libelous or threatening statements on the exterior surface of mail would be constitutional" (Appellants' Brief, p. 34). They argued, however, that because Cherry claimed his statements were true, they were not strictly libelous and were protected by the First Amendment.

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[3] The district court's opinion is reported at 272 F. Supp. 982.

[4] *Bailey* v. *Patterson*, 369 U.S. 31, 33.

[5] The constitutionality of 18 U.S.C. 1718 has also been upheld in *McCrossen* v. *United States*, 339 F. 2d 810 (C.A. 10), and *Warren* v. *United States*, 183 Fed. 718 (C.A. 8).

[6] 39 U.S.C. 4001 provides that that nonmailable matter, as defined in 18 U.S.C. 1718 and other provisions of law, shall be disposed of as the Postmaster General directs.

Contrary to petitioners' contentions, the Post Office has not suppressed the postal cards or prevented Cherry from sending them, and it has not restricted the right of Tortorice to receive them.

Section 1718 merely provides that matter which is defamatory on its face may not be sent through the mails in an exposed fashion. Cherry's defamatory message could have been sent through the mails if it had been enclosed in an envelope, or even if the postal card had simply been folded and closed with a staple or other device.[7] The statute is, we submit, a reasonable accommodation between the interests of those who use the mails and the interests of others whose reputations may be injured.[8] And since the sole function of the mails is to transmit matter from sender to addressee—a service which was available to petitioners in this case—the courts below were plainly correct in ruling that there was no substantial issue under the First Amendment. See *Kovacs* v. *Cooper,* 336 U.S. 77, 89; *Breard* v. *Alexandria,* 341 U.S. 622, 642, 644.[9]

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[7] Because of the size of Cherry's postal card (Pet. App. 35a–36a), its postage fee was the same (5 cents) as for a first class letter.

[8] See *Rosenblatt* v. *Baer,* 383 U.S. 75, 86: "Society has a pervasive and strong interest in preventing and redressing attacks upon reputation."

[9] In *Lamont* v. *Postmaster General,* 381 U.S. 301, the Court invalidated a statute which required the Postmaster General to detain, and deliver only upon the addressee's request, unsealed foreign mailings of "communist political propaganda." However, the *Lamont* decision rested expressly on "the narrow ground" that "the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgement of the addressee's First Amendment rights." 381 U.S. at 307. The Court in

2. Petitioners' additional contention—that senders of postal cards are subjected to unconstitutional discrimination because newspapers or magazines "may be sent through the mails, without wrappers, with defamation and scurrility exposed on their exterior surfaces" (Pet. 13)—is based upon a false premise. The Post Office Department regulations under 18 U.S.C. 1718 provide that newspapers and magazines which contain exposed defamatory matter are nonmailable. The fact that a different procedure [10] is fol-

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Lamont stressed that the affirmative obligation imposed upon the addressee

> is almost certain to have a deterrent effect, especially as respects those who have sensitive positions. Their livelihood may be dependent on a security clearance. Public officials, like schoolteachers who have no tenure, might think they would invite disaster if they read what the Federal Government says contains the seeds of treason. Apart from them, any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as "communist political propaganda." *Ibid.*

The considerations which motivated the Court in *Lamont* are completely lacking in the instant case. The narrow question here is whether Congress may provide that matter which is defamatory on its face may be sent through the mails only if it is covered, and not if it is exposed.

The instant case also does not involve any question as to the scope of a libel action against a "public official" or "public figure" under the doctrine of *New York Times Co.* v. *Sullivan*, 376 U.S. 254, and *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130. In this connection we note that petitioners' contention that Reverend Wood is a "public figure" was raised for the first time in oral argument before the court of appeals. Furthermore, this case does not present a situation where Congress has delegated to the Postmaster General the authority to censor the mails according to his own general conception of the public welfare. See *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146.

[10] See 39 C.F.R. 124.9(b) and Pet. App. 16a.

lowed in determining the mailability of newspapers because they involve a continuing rather than an isolated use of the mails does not establish an unconstitutional discrimination. *Tigner* v. *Texas,* 310 U.S. 141, 147.

3. Finally, the procedures followed by the Post Office Department in the present case did not violate petitioners' First Amendment rights. The rationale of *Freedman* v. *Maryland,* 380 U.S. 51, and other cases cited by petitioners, is that First Amendment rights would be impaired if government officials could suppress the dissemination of matter alleged to be obscene without the assurance of a prompt judicial review of that determination. In the present case, however, there is no threat of suppression of constitutionally protected speech. Petitioners at all times have admitted that Cherry's postal cards fall within the prohibition of 18 U.S.C. 1718. Moreover, petitioners were given a hearing before the Post Office Department, and have had an opportunity for judicial review on the constitutional objection which they have raised.[11]

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[11] There is also no merit in petitioners' contention (Pet. 18) that the Post Office Department's order to destroy the nonmailable postal cards is invalid because there was no prior judicial determination. Petitioners had notice and a hearing before the Post Office Department and the opportunity for judicial review. See *Public Clearing House* v. *Coyne,* 194 U.S. 497, 508, 515–516; 1 Davis, *Administrative Law,* § 2.13, p. 134, § 4.05, p. 253 n. 9 (1958); *Glanzman* v. *Schaffer,* 252 F. 2d 333, 334 n.1 (C.A. 2), vacated on other grounds, 357 U.S. 347. Moreover, 39 C.F.R. 953.17 provides that a party whose matter has been found to be nonmailable may apply to the Judicial Officer for its return. Cherry has never exhausted that available administrative remedy.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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